United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

75-4093

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FLORENTINO ALONZO ZAMORA
MARIA LUISA ZAMORA
and
ROBERTO ZAMORA,

Docket No. 75-4093

Petitioners,

-against-

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

B
P/S

PETITION TO REVIEW
A FINAL ORDER OF
THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR PETITIONERS

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FLORENTINO ZAMORA,
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Petitioners,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the State Department's administrative denial of Petitioners' request for asylum and its subsequent prejudicial effect in deportation proceedings violated the Fifth Amendment's guarantee of due process of law?

STATEMENT OF THE CASE

This petition has been brought to review a final determination of the Immigration and Naturalization Service. Jurisdiction of this Court is invoked under 8 U.S.C. 1105(a).

On May 24, 1974, the Immigration Judge, following a denial of petitioners' application for a temporary withholding of

deportation made pursuant to 8 U.S.C. 1253(h) entered an order of deportation against petitioners with a provision for voluntary departure..

The order of the Immigration Judge was affirmed by a decision of the Board of Immigration Appeals dated and entered April 17, 1975.

The instant petition for review was filed with this Court on May 22, 1975.

STATEMENT OF FACTS

Petitioner, Florentino Zamora is a native and citizen of the Republic of the Philippines. He entered the United States as a visitor for business on or about October 10, 1970. At that time, Mr. Zamora was authorized to remain in the United States until December 30, 1970. Subsequently, he requested and received a number of extensions to remain in the United States until October 30, 1971.

Petitioner, Maria Zamora, his wife, also a citizen of the Philippines, accompanied by Roberto Zamora, their infant son, entered the United States on January 16, 1971 as visitors for pleasure. She and her son also requested and were granted extensions of their stay to remain until January 15, 1972.

As a result of the fact that they overstayed their authority to remain in this country, the Zamoras became subject to deportation proceedings pursuant to 8 U.S.C. 1251(a)(2). Orders to Show Cause were issued by the Immigration and Naturalization Service (hereinafter "the Service") and were duly served upon petitioners.

On February 14, 1973, the petitioners applied to the District Director in New York for a grant of political asylum. Their request for asylum was forwarded by the District Director, in a letter dated February 7, 1974, to the Department of State's Office of Refugee and Migration Affairs. (App. 1,2)

In a form letter dated February 27, 1974, the Office of Refugee and Migration Affairs, acting solely on the information provided by the Office of the District Director, and without providing for petitioners' participation in its administrative determination, denied their applications for asylum in the United States. (App.3)

Subsequent to this action, a deportation proceeding was held before an Immigration Judge on May 24, 1974 at the district office of the Service in New York, New York.

At the hearing, the Zamoras, by their counsel, made

applications for a withholding of deportation under the provisions of 8 U.S.C. 1253(h). A request for the privilege of voluntary departure was also made at this time.

In order to establish his eligibility for relief under 8 U.S.C. 1253(h), Mr. Zamora testified under oath that in 1969 or 1970, he has participated in the street demonstrations directed against the government of President Marcos, where some of the demonstrators were subsequently jailed. Both, Mr. and Mrs. Zamora testified to the virtual elimination of civil liberties in the Philippines. (App. 4-7)

In an opinion dated May 24, 1974, the Immigration Judge denied petitioners' request for a withholding of deportation, but granted them the privilege of voluntary departure. (App.8-13)

The Board of Immigration Appeals affirmed the decision of the Immigration Judge on April 17, 1975. (App.14-16)

It is from respondent's arbitrary denial of relief under 8 U.S.C. 1253(h) that this Petition for Review has been brought.

SUMMARY OF ARGUMENT

Petitioners challenge the process by which the State Department determines eligibility for political asylum in the United States and the subsequent impact of this administrative determination in deportation proceedings.

It is petitioners' contention that the State Department's review and decision-making process denies them due process of law, insofar as they are precluded from (a) inquiring into the relevant facts considered by the State Department (b) examining State Department sources of information and (c) participating in an otherwise unknown administrative procedure which directly affects their ability to sustain the burden of proof pursuant to 8 U.S.C. 1253(h) and 8 C.F.R. 242.17(c).

Such action by respondent deprives petitioners of their Fifth Amendment guarantee of due process of law. Therefore, respondent's denial of petitioners' application for withholding of deportation pursuant to 8 U.S.C. 1253(h) should be reversed as being arbitrary and an abuse of discretionary authority.

POINT I

THE STATE DEPARTMENT'S ADMINISTRATIVE DENIAL OF PETITIONERS' REQUEST FOR POLITICAL ASYLUM VIOLATED THEIR FIFTH AMENDMENT RIGHT TO DUE PROCESS OF LAW IN DEPORTATION PROCEEDINGS.

The procedure used by the Immigration Service in evaluating and passing upon requests for political asylum involves a two-step process whereby the District Director of the Service seeks a determination from the State Department on the bona fides of an alien's claim for political asylum.

A letter is sent to the State Department's Office of Migration and Refugee Affairs by the District Director and that office decides whether the alien has presented facts sufficient to establish a "well-founded fear" of persecution on account of race, religious affiliation or political opinion.

Having made such a determination, the Office of Refugee and Migration Affairs sends its conclusions to the District Director and this determination is made available to the Immigration Judge at the time he passes upon an alien's application for relief under 8 U.S.C. 1253(h).

The contents of these letters have been aptly described in Kasravi v. Immigration and Naturalization Service, 400 F.2d 675,

676, 677 (9th Civ. 1968), where the court, though deciding that petitioner had failed to establish eligibility for relief under 8 U.S.C. 1254(a) and 8 U.S.C. 1253(h), stated:

> "The only evidence offered in opposition to Kasravi's petition is rather a (sic) perfunctory letter written by a State Department official concluding generally than an Iranian student would not in all likelihood be persecuted for activities in the United States. Not only does this letter lack persuasiveness, but the competency of State Department letters in matters of this kind is highly questionable."

The Court went on to point out in a footnote to this statement that:

> "Such letters from the State Department do not carry the guarantees of reliability which the law demands of admissible evidence. A frank, but official discussion of the political shortcomings of a friendly nation is not always compatible with the high duty to maintain advantageous diplomatic relations with nations throughout the world. The traditional foundation required of expert testimony is lacking; nor can official position be said to supply an acceptable substitute. No hearing officer or court has the means to know the diplomatic necessities of the moment, in the light of which the statements must be weighed." supra at 677, footnote 1. (see App.3)

It is petitioners contention that this attenuated process which denies them the opportunity to (a) inquire into all the relevant facts considered by the State Department, (b) examine

State Department witnesses and/or information and (c) challenge an otherwise unknown procedure, violates their right to procedural due process as guaranteed by the Fifth Amendment.[1]

It has long been established that an alien is a "person" entitled to the same protection of his life, liberty, and property under the Fifth Amend ent as is afforded a citizen. Galvan v. Press, 347 U.S. 522 (1954) rehearing denied 348 U.S. 852; Holt v. Klosters Rederi A/S, 355 F. Supp. 354 (D.C. Mich. 1973); U.S. ex. rel. Mezei v. Shaughnessy, 195 F.2d 964 (2d Cir. 1952), reversed on other grounds 345 U.S. 206 (1953).

In attacking the State Department's evaluation procedure, Petitioners would point out that the subsequent effect of the agency determination procedure is often used by the Immigration Judge as a presumption against the alien. This, in effect,

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[1]Petitioners would distinguish the line of cases holding that the Attorney General or his delegate may base his opinion in withholding of deportation cases on evidence which is undisclosed to the alien. see United States ex. rel. Dolentz v. Shaughnessy, 206 F.2d 392 (2d Cir, 1953) and Hosseinmardi v. Immigration and Naturalization Service, 405 F.2d 25 (9th Cir, 1968). Petitioner here contends that the process by which the State Department determines eligibility for political asylum becomes of prejudical weight in deportation proceedings and, in the face of evidence to the contrary on the issue of political asylum creates a situation which lacks the necessary procedural due process and constitutes an abuse of discretion. Cf. Foti v. Immigration and Naturalization Service, 375 U.S. 217 (1963); Wong Wing Hang v. Immigration and Naturalization Service, 360 F.2d 715 (2d Cir. 1966). (see App.17,18)

establishes a double burden on the alien seeking the benefits of Section 243(h) of the Act.[2]

In view of the fact that the Zamoras were not permitted to participate in the State Department's determination of their application for political asylum, the use of this denial in the deportation proceeding increases the burden already placed upon the petitioners by 8 C.F.R. 242.17(c) which provides in relevant part that:

> "The respondent has the burden of satisfying the special inquiry officer that he would be subject to persecution on account of race, religion or political opinion as claimed."

Considering this burden in light of the discretionary power given to the Attorney General in the withholding of deportation under Section 243(h), the alien is presented with the almost insurmountable task of first refuting a prior administrative determination and then having to establish his own eligibility for a withholding of deportation on the basis of a "well-founded

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[2] The instant case is distinguishable from Asghari v. Immigration and Naturalization Service, 396 F.2d 391 (9th Cir. 1968), wherein it was held that advice from the State Department was admissible in a deportation proceeding on the issue of relief under Section 243(h) of the Act. There only the issue of admissiblity was considered, whereas here, petitioners question the process by which the State Department's determination was made, the denial of due process inherent in that determination, and the subsequent prejudicial impact on the Immigration Judge in imposing a double burden on petitioner contrary to the intent of 8 C.F.R. 242-17(c).

fear" of persecution. This double burden runs against the weight of authority holding that;

> "The fundamental principles controlling the deliberations and determination of the immigration officials and the Secretary ...are held, in an opinion of Mr. Justice Hughes, to be "the fundamental principles of justice embraced within the conception of due process of law."

Tang Tun v. Edsell, 223 U.S. 673,682 (1912) cited in Chun Kock Quon v. Proctor, 92 F.2d 326, 327 (9th Cir. 1937).

In one of the many Chinese exclusion cases, involving a claim of citizenship, which arose in the early part of this century, Justice Clark, speaking for a majority of the Supreme Court stated:

> "The Acts of Congress give great power to the Secretary of Labor over Chinese immigrants and persons of Chinese descent. It is a power to be administered, not arbitrarily and secretly, but fairly, and openly, under the restraints of tradition and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race." Kwock Jan Fat v. White, 253 U.S. 454, 464 (1920) (emphasis added)

The Zamoras are here faced with deportation to a country with a repressive government that has evidenced its willingness to resort to violence in the suppression of all opposition. In such a case, where the Attorney General's discretionary power is so greatly influenced by an associated administrative determination,

and that determination occurs in the absence of constitutionally mandated procedural due process, the petitioners should be granted the bare minimum of fairness and be permitted to appear before the State Department's Office of Refugee and Migration Affairs, examine their information, its sources, and the overall manner in which a potentially harmful determination is made on this issue. Cf. Goldberg v. Kelly, 397 U.S. 254 (1970); Radic v. Fullilove, 198 F. Supp. 162 (N.D. Calif. 1961).

In Radic v. Fullilove, supra at 164, a case involving the deportation of a Yugoslav seaman and his application for relief under Section 243(h) of the Act, the District Court held that the failure of the Service to allow the alien-plaintiff an opportunity to examine, attack or refute documents in the file which the Hearing Examiner considered in denying his application, was unfair and essentially a violation of the alien's due process rights.[3]

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[3] Milutin v. Bouchard, 299 F.2d 50 (3rd Cir. 1962) is to be distinguished from Radic on the basis of its holding that undisclosed information relied upon by the Regional Commissioner in denying withholding of deportation need not include a finding that a disclosure would prejudice the national security of the United States.

However, in a strong dissent, Judge Staley stated that the question of whether a stay of deportation might be withheld solely upon the basis of undisclosed information must be answered in the negative. He reasoned that the net result of allowing such a holding to stand would be to effectively block the Court's power to review the Attorney General's findings in cases involving an exercise of discretion based on undisclosed information. supra at 54.

In Radic, as in the instant case, a government agency arbitrarily drew a "cloak of secrecy around such evidence as is claimed to be contrary to plaintiff's (sic) contentions." at 165.

The State Department's determination, so blatantly prejudicial to the Zamoras, was reached without the necessary due process scrutiny normally accorded persons who have a substantial interest at stake.

As Judge Halbert stated in Radic at 165,

> "Under our form of Government, the right to a hearing embraces not only the right to present evidence in support of one's position, but also a reasonable opportunity to know the claims of the opposing party with the privilege of seeking to refute those claims." It can still be said that,"...the right to be heard and the right to contest opposing evidence are equal and co-existing rights, and both are essential to procedural due process." citing Morgan v. United States, 304 U.S. 1 (1937).

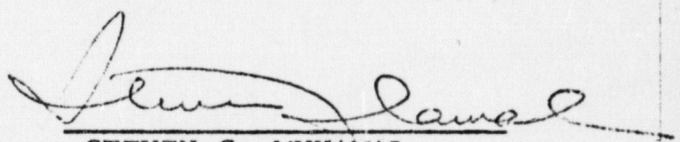
To hold that the State Department's adverse determination in the Zamoras' case was proper in the context of the prejudicial impact it had during the deportation proceeding below would be to deny them the "inexorable safeguard" of a fair hearing and the procedural due process explicitly guaranteed by the Fifth Amendment. Cf. St. Joseph Stockyards Co. v. United States, 298 U.S. 38 (1936), Morgan v. United States, supra at 15.

CONCLUSION

WHEREFORE, petitioners pray that their application for withholding of deportation pursuant to 8 U.S.C. 1253(h) be granted, OR

In the alternative, that this case be remanded to the Immigration and Naturalization Service with directions that the State Department's letter of March 29, 1974 be excluded from a reopened deportation proceeding, or that petitioners be permitted to participate in a meaningful and substantial manner in the administrative process which determines their eligibility for political asylum, so as to eliminate the deprivation of procedural due process which they have otherwise suffered.

Respectfully submitted,



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AFFIDAVIT OF SERVICE

CITY OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

MARK SCHER, being duly sworn, deposes and says:

1. That I am over 18 years of age and that I am not a party to this action.

2. That I reside at 500 E. 63rd Street, New York, New York 10021.

3. That on January 28, 1976, I did serve two copies of the brief and appendix for petitioner in the above-captioned matter upon the office of Thomas Cahill, U.S. Attorney for the Southern District of New York, located at 1 St. Andrew's Plaza, New York, New York, in the office of the Civil Clerk, located on the 5th floor at the aforementioned address.

Mark Scher
MARK SCHER

Sworn to before me this
28th day of January, 1976

Stephen Singer
NOTARY PUBLIC

STEPHEN SINGER
Notary Public State of New York
No. 30-9023418 Nassau County
Comm. Expires March 30, 1976